

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 29, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1749

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**RANDALL J. KETTNER, JEROME
KETTNER AND ESTHER KETTNER,**

PLAINTIFFS-RESPONDENTS,

v.

**DIANE B. CONRADT, AS PERSONAL
REPRESENTATIVE FOR THE ESTATE
OF EUGENE E. CONRADT, AND
STATE FARM MUTUAL INSURANCE
COMPANY,**

DEFENDANTS,

**EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY,**

DEFENDANT-APPELLANT,

**WISCONSIN DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,**

DEFENDANT.

APPEAL from a judgment of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. This action arises out of a collision between a school bus driven by Eugene Conradt and a motorcycle ridden by Randall Kettner. Employers Insurance of Wausau, a Mutual Company, appeals a summary judgment determining insurance coverage. It argues that the trial court erroneously concluded that Wausau's insurance contract with the Shiocton School District extended coverage to a school bus driven by Eugene Conradt. It argues that the trial court failed to consider binding precedent and that public policy does not support extending the omnibus statute, § 632.32, STATS., to nonowned vehicle coverage. We reject Wausau's arguments and affirm the judgment.

Kettner brought suit for injuries he sustained when the motorcycle he was riding collided with a school bus. Conradt, who owned the bus, was the driver and was operating it pursuant to a contract with the school district. Conradt carried a \$250,000 policy with State Farm Mutual Insurance Company. Wausau insured the school district with auto and umbrella coverage. The school district, however, was not sued.

The factual and procedural background can be found in an earlier appeal, *Kettner v. Wausau Ins. Co.*, 191 Wis.2d 723-24, 742-43, 530 N.W.2d 399, 406 (Ct. App. 1995). In *Kettner*, we reversed the trial court's summary judgment dismissing Kettner's complaint against Wausau. The trial court had determined that because Conradt was an agent of the school district, Kettner's

claim was limited to \$250,000 by statute and was covered by State Farm. *Id.* at 739, 530 N.W.2d at 402. We reversed and remanded for a determination in the trial court whether a master servant relationship existed between Conradt and the school district.

The trial court also determined that the omnibus statute prohibited Wausau from excluding coverage to Conradt. *Id.* at 740, 530 N.W.2d at 405. We agreed, but concluded that the omnibus clause, § 632.32, STATS., “applies only to vehicles covered under the insured’s policy.” *Id.* at 742, 530 N.W.2d at 406. Because the question was not addressed at the trial level, we remanded for a determination whether Wausau’s policy covered Conradt’s bus. *Id.*

On remand, the trial court determined that Conradt was an independent contractor as a matter of law. This ruling is not challenged on appeal. The trial court also determined on remand that Conradt’s bus was a nonowned auto insured by the school district’s policy with Wausau. It is this ruling that Wausau now challenges on appeal.

This appeal involves the interpretation of an insurance policy and its application to a § 632.32, STATS., which present questions of law that we review without deference to the trial court. *Bindrim v. Colonial Ins. Co.*, 181 Wis. 2d 799, 806, 512 N.W.2d 209, 212 (Ct. App. 1994). Wausau’s Business Auto policy provides: “We will pay all sums an ‘insured’ legally must pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies, caused by an ‘accident’ and resulting from the ownership, maintenance or use of a covered ‘auto.’”

The commercial umbrella liability portion of the Wausau policy contains similar language: “We will pay those sums that the insured becomes

legally obligated to pay as damages in excess of the ‘underlying limit’ because of ‘bodily injury,’ ‘property damage,’ ‘personal injury’ or ‘advertising injury’ to which this insurance applies.”

In the Business Auto Declarations section, Item Two states: ”This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those ‘autos’ shown as covered ‘autos.’ ‘Autos’ are shown as covered ‘autos’ for a particular coverage by the entry of one or more of the symbols from the COVERED AUTO Section of the Business Auto Coverage Form next to the name of the coverage.” The policy contains “symbol 1” indicating that the school district has coverage for an insured’s liability arising out of “any auto.”

Item Four, “Liability Insurance Schedule For Hired or Borrowed Covered Autos” calculates a premium of \$1,008 for “hired or borrowed” autos, calculated based upon “cost of hire.” “Cost of hire” is defined to mean “the total amount you incur for the hire of ‘autos,’ including charges for services performed by a school bus contractor.”

Wausau’s commercial auto liability policy and its commercial umbrella liability policy also provide, respectively:

1. WHO IS AN INSURED.

The following are “insureds:”

- a. You for any covered “auto.”
- b. Anyone else while using with your permission a covered “auto” you own, hire or borrow except:
 - (1) The owner or anyone else from whom you hire or borrow a covered “auto.” ...

....

3. With respect to “bodily injury” and “property damage” resulting from the ownership, maintenance or use of an “auto,” each of the following is an insured:

- a. You are an insured for any “auto.”
- b. Anyone else is an insured while using with your permission an “auto” you own, hire or borrow except:
 - (1) The owner or anyone else from whom you hire or borrow an “auto.” ...

The omnibus clause, § 632.32(3) and (b), STATS., states:

(3) REQUIRED PROVISIONS. Except as provided in sub. (5), every policy subject to this section issued to an owner shall provide that:

- (a) Coverage provided to the named insured applies in the same manner and under the same provisions to any person using any motor vehicle described in the policy when the use is for the purposes and in the manner described in the policy.
- (b) Coverage extends to any person legally responsible for the use of the motor vehicle.¹

Kettner held that the omnibus clause does not permit an insurer to cover a vehicle but exclude coverage to certain drivers of covered vehicles. *Id.* at 741-42, 530 N.W.2d at 406. In *Kettner*, we concluded that “despite the fact that the school district did not own the bus, the omnibus statute would apply to the school district as the named insured on the insurance policy.” *Id.* at 742, 530 N.W.2d at 406.

The trial court concluded on remand that Conradt’s bus is covered by the policy. We agree. The school bus was a “hired” auto as that term is used in the policy. The policy provided liability coverage for an insured’s liability arising out of “any auto.” The policy states an insured is “any person using with the school district’s permission an auto” the school district hired, except an owner of the hired auto. Under the omnibus clause, however, coverage extended to the

¹ Wausau does not argue that one or more of the exceptions in § 632.32(5), STATS., “Permissible Provisions” apply.

named insured applies in the same manner to any person using the vehicle described in the policy when the use is for the purposes and in the manner described in the policy. *Id.* The school bus was hired by the school district to transport school district children at the time of the accident. There is no suggestion that this use was not for the purpose and manner contemplated by the policy. Consequently, coverage extended to the school district extends to Conradt.

Wausau argues that the issue is whether the omnibus clause requires the district to insure a bus owned by an independent contractor simply because the district purchased coverage for secondary liability arising out of the use of nonowned vehicles. This argument ignores the premium paid for and liability coverage extended to “hired” autos. Wausau also argues that the “omnibus statute does not apply to non-owned auto coverage because non-owned autos, by definition, are not described in the policy.” These arguments were rejected in *Kettner*, 191 Wis.2d at 741, 530 N.W.2d at 406, where we concluded that the fact that the named insured is not the owner of the vehicle does not preclude the application of the omnibus statute.

Wausau cites a series of cases for the proposition that the omnibus statute does not apply to extend coverage for use by drivers of nonowned vehicles. It argues that the trial court erroneously failed to consider this binding precedent. This argument merely re-states the former arguments rejected in *Kettner*. We are bound by *Kettner*. See *In re Court of Appeals*, 82 Wis.2d 369, 263 N.W.2d 149 (1978).

Next, Wausau relies on the affidavit of Tom Swenson, its assistant vice president underwriter, that states that the risk covered by the policy is for school district liability for any hired or borrowed auto, arising through vicarious

liability or allegations of negligent hiring or supervision. We are unpersuaded. Wausau does not point to any policy language to support Swenson's conclusions. "In resolving the ambiguity and determining the parties' intent, the court may look beyond the face of the contract and consider extrinsic evidence." *Capital Invests. v. Whitehall Packing Co.*, 91 Wis.2d 178, 190, 280 N.W.2d 254, 259 (1979). Wausau does not suggest the policy is ambiguous. Absent an ambiguity in the contract language, a court does not consider extrinsic evidence of the parties' intent. *See id.*

Finally, Wausau argues that public policy does not support the result reached here. Because we are not a policy making body, it is our function to interpret and apply legislation, not to legislate. *Bindrim*, 181 Wis.2d at 813, 512 N.W.2d at 215.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

